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IN THE

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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1941

No. 27

In the Matter of [illegible]

Petition [illegible]

Order [illegible]

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IN THE

Supreme Court of the United States.

October Term, 1941.

No. .

In the Matter of HARRY M. ALBRIGHT, BANKRUPT,
ROBERT P. SHICK, *Petitioner,*

v.

WILLIAM A. GOODMAN, TRUSTEE OF HARRY M. ALBRIGHT, BANKRUPT, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

The Petitioner, Robert P. Shick, prays that a writ of certiorari issue to review the final order of the United States Circuit Court of Appeals for the Third Circuit, entered on October 10, 1941, *on the same afternoon on which argument was heard* on petitioner's appeal from the final order of March 21, 1941, (by Kirkpatrick J.) in the United States District Court for the Eastern District of Pennsylvania, in the Bankruptcy Cause No. 8578.

This order in this Circuit Court of Appeals was:

"Before Maris, Jones and Goodrich, Circuit Judges.

Per curiam.

The order of the District Court is affirmed."

No opinion was filed in support of the order. A petition for a rehearing evoked but an order,—"Denied", on October 30, 1941,—again without any memorandum or opinion, stating that Court's reasons for such its summary orders.

A. SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

The proceedings in the District Court were on petitioner's petition, praying that,—

1st., Restraining orders, allowed by that court on March 14, 1927, be vacated;

2d., A fund in escrow, under an agreement between petitioner and Albright, the bankrupt, and the Norristown-Penn Trust Company as escrowee, of October 18, 1923, be awarded to petitioner;

3rd., the State Court (C. P. of Montgomery County, Pennsylvania) be properly advised as to the legal effect of the usurped and void findings and orders of the referee (of September 28, 1926), and be instructed and requested to reverse its findings and orders of August 9, 1935 and reinstate petitioner's judgment liens (to 159 and 160, September Term, 1923 there), to remain in full force and effect, as originally entered; and

4th., the trustee be directed to show cause why he should not be adjudged in contempt, for his deceit, misrepresentations, and misuse of ("playing fast and loose" with) the process of the Federal Court.

A rule was allowed on this petition, the trustee respondent filed his answer, and after argument, that District Court, filed an opinion and later entered its final order, denying each and all of these prayers. The appeal from this final order to the U. S. C. C. A. 3d. C. then followed.

The Factual Situation.

The basic facts may be shortly summarized:—

I. On September 14, 1923 petitioner was the holder for value of 3 judgments entered of record in Montgomery County, Pennsylvania—self-confessed on "judgment" notes executed by H. M. Albright and *under his seal*—

and liens against several parcels of land owned by him in that county:—

(1) For $3000.00 entered October 4, 1922, on his note of that date, in favor of petitioner as payee;

(2) For $3,600.00 on his note of December 14, 1922, in favor of Walter G. Roland as payee and by him assigned to petitioner on February 5, 1923 but judgment not entered thereon until September 14, 1923, in favor of petitioner as the use-plaintiff;

(3) For $39,300. on his note of July 9, 1923, in favor of Walter G. Roland as payee, shortly thereafter assigned by him to petitioner but judgment not entered thereon until September 14, 1923, in favor of petitioner as the use-plaintiff.

II. In October 1923, the judgment debtor desired to convey one parcel of his lands. To enable him to give a title clear and insurable, on October 18, 1923, an agreement was executed between petitioner and this debtor, and the Title Insurance Company, whereby releases of the judgment liens were delivered by petitioner to the title insurance company, upon the usual representation to it by debtor, that no bankruptcy proceedings were contemplated by him and the net proceeds of the sale were deposited with

that company in escrow, pending the settlement of debtor's "claim that the three judgments were not valid liens, amicably or by appropriate legal proceedings". This escrowed fund was $6,000. or more, and the judgments remained liens upon the other valuable real estate of debtor.

III. This basic situation was a common and very usual one in Pennsylvania, readily solved by that State's well known practice, of petitions and rules to open judgments and be let into a defense, where the questions involved are resolved as if in equity—on bill and answer, and depositions, if necessary.

IV. The debtor did not follow this course but compelled petitioner to bring the issue into court, by issuing attachments sur execution upon the three judgments, the service of which on November 7, 1923, drew the fund into the possession of the State court (Common Pleas of Montgomery County) and gave that court *complete* and *exclusive* jurisdiction over the fund (in lieu of real estate) and the judgment liens—as the *res*—and over the parties thereto,

prior

to the debtor's adjudication in voluntary bankruptcy on November 9, 1923.

V. From that time on, the debtor as the bankrupt and his trustee, pursued a course, with the purpose (openly avowed by trustee's counsel in an argument *coram* the State court) of defeating petitioner's "secured claims" upon the judgments—self-confessed upon notes under debtor's seal and to this day never questioned as to their authenticity or delivery to their respective payees—by the use of every means possible.

His "maneuvers" failed to defeat the $3,000.00 judgment, which was paid on December 24, 1924 on the order of the referee, directing the trustee to request the escrowee-garnishee to pay it upon a release by the trustee to it for the amount due on it. Thereafter the fund in escrow, of about $3,000.00 and the remaining parcels of land, remained as security for the 2nd and 3rd judgments. This property, however, has now been confiscated without due process of law so far as petitioner's rights are concerned, by the successive errors of fact and law in the bankruptcy court (referee and District Court) and the State Courts, induced by the void and illegal orders of the referee (Sept. 28, 1926), apparently affirmed on review by the District Court—that make this case a veritable tumulus of error, concealing the true basic situation and remedy suggested in paragraph III, *supra.*

These errors chronologically were:—

(a) the referee failed to give petitioner a day in court, to present evidence in support of the validity of these two judgments, as he several times ruled in the hearings before him, prolonged through almost three years;

(b) the referee's findings were based on evidence, inadmissible under Pennsylvania laws, and *res inter alios acta,* because educed from the legal plaintiff in the notes, subpœnaed under Sec. 21-a of the Bankruptcy Act, to testify as to the "acts, conduct and property of the bankrupt" only;

(c) the referee's proceeding in a summary way to pass upon petitioner's secured claims and right to the escrowed fund, violated Sec. 23 of the Bankruptcy Act;

(d) the trustee on October 8, 1926 practiced a deceit upon the State Court by suppressing the referee's orders of September 28, 1926 and thereby justified the State court's findings that it was the *proper forum* in which to attack these judgments, and orders that the trustee should file there his petitions to open the judgments etc., at the same time giving him *stay orders,* "freezing" all proceedings on the judgments or attachments;

(e) the trustee on March 14, 1927, was disingenuous to the U. S. District Court in not disclosing these orders of the State court, of Jan. 28, 1927 (final because not appealed), when the federal restraining orders were granted so improvidently by that federal court;

(f) the reviewing District Judge later affirmed these referee's orders of September 28, 1926 in decisions and orders, "squinting," *not square* and *precise,* as required by law;

(g) the trustee misused these apparently affirmed orders of the referee, in support of pleas of *res judicata,* in securing from the State court piecemealwise:—

1. a dissolution of the attachments on July 18, 1930;

2. a reversal of the judgments on January 17, 1936;

3. a refusal by the State court, of an award of the escrowed fund, in March 1940.

The net result of all these moves by the trustee is that the fund is now a *waif,* probably liable to an escheat, the judgment liens are reversed, the whole purpose of the escrow agreement or contract of October 18, 1923 frustrated, the fundamental rule of comity disregarded and all of petitioner's security for "secured claims" (so scheduled

by the bankrupt and the referee), confiscated without due process of law as guaranteed the petitioner under the 5th and 14th Amendments to the U. S. Constitution. These several results were obtained by the trustee, by the highly irregular "piecemeal procedure", in presenting in 1930 to 1936 to the State court the apparently affirmed orders of the referee (of September 28, 1926) as *res judicatæ* of his alleged defenses to the judgments—in complete disregard (a) of the final orders of January 28, 1927 in the State court, as to the proper forum and appropriate procedure, to attack the validity of the judgments, and (b) the pleas of laches, *res judicata* and estoppel and suggestion of a breach of the rule of comity, interposed by petitioner to the trustee's several petitions, to dissolve the attachments, to vacate the stay orders in the State court, to open and reverse the judgments and to award the fund to the trustee.

B. JURISDICTIONAL STATEMENT.

1. This decision raises the federal question of the pleading of federal decrees or orders (*not* directly or precisely affirmed), in a state court, and thereby persuading the state court, to disregard its own prior final findings and orders and to reverse judgments, self-confessed on notes under debtor's seal (never once questioned in any wise as to their execution and delivery to creditor)—a question reviewable under § 237 (b) of the Judicial Code, 28 U. S. C. Sec. 344 (b).

2. The lower circuit court of appeals has rendered a decision in conflict with prior decisions of this Court (U. S. S. C.), as well as those of the same and other circuits and of the Commonwealth of Pennsylvania, the *locus contractus* and the prior adjudicated and by the respondent conceded

proper forum, in which in appropriate proceedings to open judgments, etc., and procure an award of the fund in escrow under an agreement to substitute it for a parcel of land, which was subject to the liens of these judgments.

3. This decision has decided important questions of local law in conflict with applicable local decisions, relative to (a) instruments under seal and pleas of want of consideration therefor; (b) the value or weight to be given to oral testimony, as against oral testimony, supported by documentary evidence, in support of a petition to open self-confessed judgments entered upon notes under seal, etc.; (c) the use of a foreign record, contrary to the provisions of Art. IV, Sec. 1, of the U. S. Constitution.

4. This decision has wholly disregarded the rule of comity, basic and fundamental in our American jurisprudence, with its dual system of courts of concurrent jurisdiction.

5. This decision condones and perpetuates a miscarriage of justice, in the impairment and violation of contract rights, and the confiscation of property, without due process of law, contrary to the 5th Amendment to the U. S. Constitution,—accomplished (a) by piecemeal procedure and (b) a failure to show "the utmost good faith" and make "the fullest disclosure in one jurisdiction with reference to what are the exact facts relevant to litigation in a corresponding case in the other", so as to eliminate "any competition or rivalry on the part of the two courts themselves in regard to assuming jurisdiction"—censured (as to a) and enjoined (as to b) by this court in its decisions.

6. This decision has in the above respects so far departed from the accepted and usual course of proceedings

and so far sanctions such a departure in the lower district court, as to call for an exercise of this court's power of supervision—to correct a result that has "no basis in morals, in reason or in law" for a conscious sanction of the palpable miscarriage of justice.

C. QUESTIONS PRESENTED.

1. Presently, the question is whether a federal court should or may refuse to vacate its restraining orders to "stay further proceedings to enforce attachments execution" *sur* judgments in a state court, but issued improvidently under the peculiar circumstances of this appeal in the court below, and now continued in a vain and oppressive way, inasmuch as the stated purpose of them has long since been fulfilled and become moot, by reason of the attachments having been dissolved by the state court on July 18, 1930.

2. Basically and fundamentally the questions may be concisely stated:—

a. May a referee in bankruptcy adjudge to be void "secured debts", in the form of judgments in a state court and liens upon lands of debtor there and upon a fund escrowed in lieu of one parcel thereof, in plain violation of the provisions of the Bankruptcy Act in Section 23 "Jurisdiction of United States and States Courts", the 5th and 14th Amendments to the U. S. Constitution (as to due process of law) and of an agreement between the judgment debtor and his creditor, *induced* by debtor's representation that no bankruptcy proceeding was involved or contemplated by him, that in consideration of creditor's release of the liens, the fund realized from the sale of a parcel of debtor's lands should be escrowed in a 3rd party's hands until the

validity of the judgment liens had been determined "amicably or by appropriate legal proceedings" under the law of the Commonwealth of Pennsylvania, the *lex loci contractus?*

b. May a bankruptcy court render "squinting" decisions, apparently affirming such orders of the referee, and then permit and condone the use by the trustee in bankruptcy of the debtor (*under the protection of improvidently issued restraining orders*) of such apparently affirmed orders, in support of pleas of *res judicata,* to secure from the state court,—

First, a dissolution of attachments execution, which had drawn the escrowed fund into the possession and control of the state court, *prior to debtor's adjudication in bankruptcy,* as conceded by the trustee;

Secondly, a vacation of the state court's prior stay orders—allowed on the petitions and rules of this trustee for leave to intervene as party defendant in the judgment liens against debtor's land, and

Finally, a reversal of record by the state court, of these judgments, in favor of the defendant, with the *confiscation* thereby of the security for petitioner as creditor's judgment liens—

All three such orders being contrary to local (Pennsylvania) law as well as to the state court's own final and conclusive findings and orders thereon, that it was the *proper forum* in which to test the validity of these judgments and directing the trustee to file there his proper petitions to open the judgments and be let into a defense thereto, in this respect also directly violating the "law of the case" as made

by this trustee on his own petitions to the state court,—*prior* to the allowance of the federal restraining orders and to the federal district court's orders apparently affirming the referee's orders?

c. May the federal bankruptcy court and its process be used by the debtor in an openly *avowed* purpose or intention to "hinder, delay and defraud" a secured creditor of his security, as above outlined in the next above paragraph 2b?

d. May a federal court of equity decline or should it fail, when satisfied that itself or other courts, have fallen into a mistake, to overrule its own error or errors, and to revise without reluctance the errors or mistakes of a state court, that may have been *induced* by the fiat, not reasoned, judgments or orders of it (the federal court)?

e. Should a trustee in bankruptcy be rebuked or penalized for such contemptuous disregard of the "law of the case", as made by him in the state court, and misuse or abuse federal bankruptcy court's process, to accomplish his avowed purpose of defeating claims of a creditor upon self-confessed judgments upon notes under debtor's seal and never once questioned by him as to the execution and delivery of such notes?

D. REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. This case raises a federal question, of pleading federal orders or decrees as *res judicatæ* in a state court, whose jurisdiction had concededly vested *prior in tempore* and therefore *prior in jure* and on the faith thereof, persuading the state court to disregard its own prior final and conclu-

sive findings and orders, so ruling, and prescribing proper procedure in that state court,—reviewable under Sec. 237 (b) of the Judicial Code, 28 U. S. C., Sec. 344 (b).

2. The order of October 10, 1941, of the U. S. C. C. A. 3d C., sanctions *fiat law, not reasoned justice*, in its disregard of fundamental principles of law in American jurisprudence and the Constitutional rights of litigants, under Art. IV, Sec. 1 of the U. S. Constitution and the 5th and 14th Amendments thereto.

3. This order sanctions and perpetuates a most unseemly conflict of jurisdiction between a federal bankruptcy court and a state court and "competition or rivalry on the part of these courts in regard to assuming jurisdiction", in complete disregard (a) of state (Pennsylvania) law as to contracts, judgment liens and defenses thereto, and the "appropriate proceeding" under that state's law, as provided for in the escrow agreement substituting a fund for land subject to the liens of the judgments, and made by the parties involved under a representation by the debtor that no bankruptcy was involved or contemplated by him, *prior* to his adjudication in voluntary bankruptcy, (b) of the federal principle of law, relative to comity as well as (c) the general principles of procedure, relative to piecemeal presentation of a cause, pleas of *res judicata,* laches, estoppel, "law of the case" and the equitable rule that *equity seeks to determine in one proceeding all issues involved* and *thus finally to terminate the whole litigation.*

4. "Right reason and conscience" have not been followed but "formalism has tempted the intellect" of the district and circuit judges "by the lure of scientific accuracy" (Cardozo, "Nature of the Judicial Process" pp. 66, 137).

5. This order and its disposition of the questions involved, are not in harmony or consonance with "ancient landmarks" in American Jurisprudence, of the decisions of the U. S. C. C. A.s, of this and other circuits,—of this Court (U. S. S. C.) and of the local law and decisions of the Commonwealth of Pennsylvania's courts.

6. The writ should be allowed, to correct the successful attempt (up to this date) of a debtor, by the use of the bankruptcy court, to "hinder, delay and defraud" his creditor, holding "secured claims" against the debtor and his lands, within the jurisdiction of a state court, whose jurisdiction concededly had *first been vested and therefore was exclusive to the end of the final disposition* of the controversy as to the validity of judgment liens (self-confessed judgments upon debtor's notes under his seal and never once questioned as to their execution and delivery) in accordance with the local state law and thereby prevent a *confiscation in fact,* without due process of law, of cash and real estate of the value of upwards of $30,000, the creditor's security for his claims.

PRAYER.

Wherefore, it is respectfully, but earnestly urged, that the writ of certiorari should be granted, as prayed for, to review and correct the gross miscarriage of justice, brought about by the deceit, "playing fast and loose with the processes of law" and contemptuous disregard of final judgments obtained by him, on the part of the trustee and his counsel but also by a proper warning or admonishment, to rebuke such tactics in federal bankruptcy causes. A stern rebuke or warning in a review of this case and correction of the gross injustice to petitioner in substantial property

rights, would *serve a public purpose as well, in the correction of a growing evil in commercial transactions and litigation.*

ROBERT P. SHICK,
Petitioner.

Philadelphia, Pa., Jan. 7, 1942.